NO. 41885-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DENNIS MCDANIEL,
APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Susan K. Serko

No. 09-1-05629-5

Brief of Respondent

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2. Whether the trial court properly denied Defendant's motion to admit evidence of the victim's mother's drug and vocational history as not relevant.

3. Whether the defendant has failed to meet his burden of showing either prosecutorial misconduct or that the unchallenged argument at issue was flagrant and ill-intentioned.

4. Whether the trial court properly granted the trial continuances where those continuances did not violate Defendant's rights to speedy trial as protected by the time for trial provisions of CrR 3.3.

B. STATEMENT OF THE CASE.

1. Procedure

On December 16, 2009, Dennis McDaniel, hereinafter referred to as "Defendant," was charged by information with one count of first-degree rape of a child. CP 1.

The State filed an amended information on June 15, 2010, which added count II, first degree child molestation. CP 7-8.

The court originally set Defendant's trial date for February 24, 2010. CP 159; Appendix A. However, on January 15, 2010, the defendant requested a 106-day continuance to June 10, 2010, which the court granted. CP 160; Appendix B.

On June 10, 2010, both parties requested a 39-day continuance to July 19, 2010, which the court granted, due, in part, to the receipt of new discovery in the form of counseling records. CP 161; Appendix C.

On July 19, 2010, the State requested a 52-day continuance to September 9, 2010, which the court granted, due to the unavailability of two of the State's material witnesses and the scheduling of a defense interview of one of those witnesses, who was apparently out of the country at the time. CP 162; 02/24/2010 RP 4-11[1]; Appendix D.

On September 3, 2010, defense counsel and the State requested a continuance of 54 days to November 2, 2010, which the court granted due to the defense attorney's necessity to interview witnesses, and the court's *in camera* review of newly obtained discovery. CP 163; Appendix E.

On November 2, 2010, both parties requested a 30-day continuance to December 2, 2010, which the court granted. CP 164; 11/02/2010 RP 13-15; Appendix F.

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[1] Reports of pre-trial proceedings will be in the following format: [Date of proceeding] RP [page number]; otherwise citations to the report of proceedings will follow the format: RP [page number].

On December 2, 2010, the defense requested a 35-day continuance to January 6, 2011, which the court granted because the defense attorney was in trial in another case at the time. CP 165; Appendix G. The State was ready for trial that day. CP 165; Appendix G.

Finally, on January 6, 2011, the court moved for a continuance of seven days to January 13, 2011 because it was conducting the trial of another case. CP 166; 06/11/2011 RP 3-7; Appendix H.

On January 13, 2011, this case was called for trial, RP 3-5, and the court and parties discussed the proposed juror questionnaire. RP 19-30.

The defendant moved to dismiss for violation of speedy trial or time for trial provisions. RP 30-34. The court found that there was good cause for each continuance granted and denied the motion. RP 34.

The defendant moved to exclude evidence of his past sex offense, arguing that RCW 10.58.090 was unconstitutional, and that such evidence was not otherwise admissible under RCW 10.58.090 or ER 404. RP 38-46, 56-57, 59. The State argued that such evidence was admissible under both provisions. RP 48-56, 59. *See* CP 6, 77-93. The court excluded evidence of the prior conviction. RP 85-90. *See* RP 58.

The court considered motions in limine, RP 60-92, 250-70; CP 58-59, 94-98, including defendant's motion to "exclude any expert opinion regarding the credibility of the alleged victim, and any expert opinion on whether the alleged victim has been sexually assaulted." RP 69-71. The

State made a similar motion, RP 74-75, and the court granted both, holding that testimony on the credibility of other witnesses would be excluded. RP 71-72, 75.

The court also conducted a pre-trial hearing concerning the competency of C.D. to testify and the admissibility of some of her statements, including those to Cornelia Thomas in her forensic interview. RP 92-249. The State called Cornelia Thomas, RP 95-118, Elizabeth Wendell, RP 118-34, Rachel McCutcheon, RP 135-74, 180-94, C.D., RP 195-213, S.D., RP 213-25, and Maria Del Carmen Garcia-Dionisio, RP 226-37, and played the video recording of the victim's forensic interview. RP 111-12.

The State argued that victim C.D. was competent and that her statements, including the video recording of her forensic interview, should be admitted into evidence. RP 238-41. *See* CP 4-5, 60-76. The defense deferred to the court with respect to the competency of C.D. to testify, and, reminding the court of the proper standard of admissibility under ***State v. Ryan***, 103 Wn.2d 165, 691 P.2d 197 (1984), deferred to the court with respect to admissibility of C.D.'s statements. RP 240-41. The court found that C.D. was competent to testify and that her statements were admissible. RP 241-44.

With respect to the video recording of C.D.'s forensic interview, the State argued that "the preliminary conversation and rapport building" portion of the interview was *not* being offered "in some attempt to bolster

the credibility of the child's statement," but "to provide the jury with "some context to the statements that C[.D.] gave to Cornelia Thomas" so that it could properly assess the credibility of those statements. RP 244-46. *See* CP 94-98. The defendant argued that admission of this portion of the interview would be "a comment on [C.D.'s] credibility." RP 246-47. *See* RP 70-71. The court ruled that the entire video was admissible to provide the jury with the "context" in which the statements were made. RP 248.

The State moved to exclude evidence of Rachel McCutcheon's alleged drug use at any time other than that of C.D.'s disclosure to her of sexual abuse in this case. RP 253-54, 259-60, 281-82; CP 94-98. The defendant argued that evidence of McCutcheon's alleged drug use, employment as a stripper, and prior CPS investigation was relevant to "why this child[. i.e., C.D.] tells this story." RP 257-58, 261-62, 283-87. Although the court initially deferred judgment, RP 258-59, it ultimately held that such evidence was not relevant and therefore, not admissible. RP 287-303, 305-09, 313-25.

The parties then selected a jury, RP 276-80, 304-05, and gave their opening statements. RP 305.

The State called C.D., RP 326-45, Rachel McCutcheon, RP 345-96, S.D., RP 396-419, Maria Del-Carmen, RP 419-41, Teresa Russell, RP 448-82, Detective Gretchen Aguirre, RP 510-21, Cassandra Ellsworth, RP

522-43, Elizabeth Wendell, RP 543-60, Cornelia Thomas, RP 565-91, and Dr. Rebecca Wiester, M.D. RP 620-60.

The State then rested. RP 661.

The defendant moved to dismiss one of the counts for insufficient evidence, and that motion was denied. RP 592-606; 661.

On January 31, 2011, the State filed a second amended information which deleted the language "and not in a state registered domestic partnership with the defendant" from count II. CP 109-10; RP 663-65.

The defendant called Gary Wayne Russell, RP 666-95, S.D., RP 695-708, and H.M.C., RP 708-17, before testifying himself. RP 722-80. The defense then rested. RP 780.

The parties discussed jury instructions. RP 483-93, 592-607, 614-19, 661-62, 665, 719-21, 781. The State proposed 14 jury instructions to which the defendant made no preliminary objection and took no exception. RP 485-93, 592-607, 614-19.

The court then instructed the jury, RP 781-82, CP 111-128, and the parties gave their closing arguments. RP 782-803 (State's closing argument); RP 804-15 (Defendant's closing argument); RP 816-21 (State's rebuttal argument).

On February 2, 2011, the jury returned verdicts of not guilty to first-degree child rape as charged in count I. and guilty of first-degree child molestation charged in count II. CP 129-30; RP 829-31.

On March 11, 2011, the court sentenced the defendant to 160 months to life in total confinement on count II, as well as lifetime community custody upon release, and payment of legal financial obligations totaling $3,800.00. CP 134-54; RP 850-53, 855.

The defendant filed a timely notice of appeal the same day. CP 155; RP 853.

2. Facts

C.D. testified that she was six years of age, and currently enrolled in Kindergarten. RP 327-28. She lived in a house with her grandmother, Maria, sister, S.D., and father, Malcolm. RP 329. C.D. identified her mother as Rachel, and testified that she used to live with her. RP 330-31. C.D. also testified that she sometimes stayed at the defendant's house. RP 332-33. She indicated that the defendant lived with his girlfriend, Teresa, and her daughter, H.M.C. RP 333. *See* RP 452.

C.D. testified that the defendant touched her in places that she didn't like, and "that he wasn't supposed to be touching me." RP 335, 340. She indicated that the defendant touched her "front private," in an area normally covered by her underwear. RP 336. She testified that she remembered telling someone that the defendant touched her with hand sanitizer, but testified that she did not currently remember that incident.

RP 339, 341. She testified that she reported this to her mother, father, sister, and grandmother. RP 337-38. She later saw a doctor. RP 338.

Rachel McCutcheon testified that C.D. was her only child, that C.D. was born on October 18, 2004, and that she was currently six years of age. RP 346, 377, 391. McCutcheon identified the defendant as a family friend whom McCutcheon had known since she was five years of age. RP 347.

McCutcheon testified that C.D. would visit the defendant at his home a couple times per month, sometimes overnight, during the period from November, 2007 through February, 2008. RP 347-48, 368-69, 391. *See* RP 667. McCutcheon testified that the defendant lived with his girlfriend, Teresa Russell, and her daughter, H.M.C. RP 347-48, 367, 452.

In early, 2008, C.D. told McCutcheon that the defendant put hand sanitizer on his hands and touched C.D.'s "private." RP 349. McCutcheon testified that C.D. used the term "private" to refer to her "vaginal area." RP 351, 373-74. C.D. indicated that the defendant was touching himself at the same time. RP 357. C.D. reported that this touching occurred one time. RP 352. McCutcheon testified that C.D. also reported this to her grandmother, Maria, her sister S.D., and to S.D.'s Boys and Girls Club Big Sister. RP 356.

McCutcheon testified that C.D. reported this to her twice, separated by a period of about six to eight months. RP 353-54. She testified that, during the time period of the second report, C.D. was

"wetting herself," "very antsy," and seemed to be having nightmares. RP 358, 418, 431.

McCutcheon said she called the police, and took C.D. in for a medical examination at Harborview Medical Center's Children's Clinic and a forensic interview. RP 356-359, 375. *See* RP 433. C.D. also went to about six months of counseling, which addressed the "inappropriate contact." RP 360. *See* RP 412.

McCutcheon testified that she never told C.D. to fabricate the allegations against the defendant. RP 392.

S.D. testified that she was 14 years of age and in the eighth grade. RP 397. S.D. testified that C.D. was her little sister, RP 398, and that C.D. told her that the defendant touched her with hand sanitizer on her "private part." RP 403-04. S.D. testified that C.D. referred to her vagina as her private part. RP 405.

S.D. then involved their grandmother and C.D. told their grandmother that the defendant had touched her private part. RP 407, 419. S.D. testified that she never told C.D. what to say in court and never heard anyone tell C.D. what to say. RP 409.

Maria Del-Carmen testified that Malcolm Davis was her son, and that his daughters, C.D. and S.D., were her grandchildren. RP 422. Del-Carmen testified that she was driving C.D. back from the park when C.D. told her "Dennis touched me here," as she pointed with her finger to her vagina. RP 427. Del-Carmen took C.D. home, where C.D. reported the

touching to S.D. RP 428-29. She told S.D. that Dennis put hand sanitizer in her privates. RP 429.

Del-Carmen called CPS to report what C.D. had disclosed and indicated that McCutcheon called the police the next day. RP 432-33. Del-Carmen never told C.D. what to say. RP 440.

Teresa Russell testified that the defendant is her fiancée and that they have two children in common, D.G.M., Jr., and N.M. RP 449-51. She testified that all of them lived with her father at a home in Tacoma, Washington. RP 452. *See* RP 667, 760-61. Russell testified that her other child, H.M.C., also lives with her at that home. RP 452. She testified that C.D. would come to visit their home quite often. RP 452-53. In fact, C.D. spent about one and a half to two weeks during the Christmas, 2007 holiday with the defendant and Russell, and slept in H.M.C.'s bedroom. RP 454.

Although Russell initially indicated that the defendant was never alone with C.D., she later admitted that it was possible he was. RP 455-56. She also testified that there was hand sanitizer in the house, but that it was placed too high for C.D. to access by herself. RP 456-57, 473. *See* RP 680-81.

Elizabeth Wendell testified that she was part of the Big Brothers and Big Sisters program, and that she served as a big sister for S.D. RP 544. Wendell stated that when she picked up S.D. for an outing, C.D. told her, "I put hand sanitizer on my private." RP 548-49. When she returned

that afternoon, C.D. told her that "Dennis put hand sanitizer on my privates." RP 550-51. Wendell called CPS to report the disclosure the same day, which she testified was about June 14, 2009. RP 554, 558.

The defendant testified that he had a dating and sexual relationship with McCutcheon, and that, for a time, lived with McCutcheon and C.D. RP 724-26, 738. However, the defendant testified that he never changed C.D.'s diaper or assisted in bathing her. RP 726, 773. He testified that during the time period between November, 2007, and February, 2008, C.D. came over to his residence four to five times, and that she would spend the night there "a lot." RP 736-37. He admitted that there was hand sanitizer in the house. RP 742. However, he testified that he never touched C.D.'s vaginal area with or without hand sanitizer or oil. RP 753.

The defendant testified that he was never alone in the house with C.D, RP 741, 755-57, and in fact, that everyone in the house, including Russell's father, provided care for C.D., except him. RP 757-58. Nevertheless, the defendant testified that he considered C.D. like a daughter and that she thought of him as her father. RP 769-70. The defendant later testified that although he was never alone with C.D. in the house, there were times that he was alone with C.D. in a room. RP 776-80.

Detective Gretchen Aguirre testified that Rachel McCutcheon reported the contact to Tacoma Police and that Aguirre was assigned to do follow up investigation on the initial report. RP 514-15. She spoke to the

witnesses and arranged for a forensic interview of C.D., which she observed. RP 516-17. After that, Aguirre made contact with and spoke to the defendant. RP 519-20.

Cornelia Thomas, a forensic child interviewer, conducted a forensic interview of C.D. RP 541. She testified that she had received "training for child forensic interviews," described that training, and explained child forensic interviewing guidelines, including the "funnel method." RP 567. The video recording of Thomas's interview with C.D. was then admitted and published for the jury. RP 582.

Cassandra Ellsworth, a youth and family therapist with a master's degree in therapy, provided counseling for C.D. after McCutcheon called the agency for which she worked. RP 526-28. C.D. pointed to her vagina, and told Ellsworth that Dennis touched her there, her "privates," and that it happened three times. RP 533.

McCutcheon indicated that C.D. had "began wetting herself after already completing potty training," had nightmares, and seemed to be "clingy to mom." RP 530, 539-40. Ellsworth met with C.D. four times, and indicated that "the child showed regression in other areas of accomplishment." RP 531-32. Ellsworth testified that these behaviors can be an indication that abuse has occurred, though there could be other causes, as well. RP 541-42.

Dr. Rebecca Wiester, an attending physician at the Sexual Assault Center of Harborview Medical Center and head of the child abuse program at Seattle Children's Hospital, conducted a medical examination of C.D. on July, 27 2009. RP 621-30. During that examination, C.D. told Wiester, "somebody got on my private." RP 634. C.D. subsequently indicated that it was "Dennis" who "got on" her private. RP 634-35. C.D. went on to explain that Dennis touched her private with his fingers. RP 636-37. C.D. reported that this happened one time and that Dennis told her not to tell anyone. RP 637. Dr. Wiester's physical examination of C.D. did not reveal any signs of physical trauma, or specifically, genital trauma. RP 642. However, Wiester testified that, based on the medical literature and clinical experience, "the majority of children who experience sexual abuse actually have normal examinations." RP 642. She also testified that "bedwetting is a very nonspecific symptom of anxiety, change, and it's not something that we generally think of as an indicator for child sexual abuse." RP 647-48.

C.D. was not married to or in a domestic partnership with the defendant. RP 391.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY ADMITTED THE TESTIMONY OF CORNELIA THOMAS BECAUSE SUCH TESTIMONY PROVIDED THE NECESSARY CONTEXT THAT ENABLED THE JURY TO ACCESS THE REASONABLENESS OF THE VICTIM'S INTERVIEW RESPONSES AND DID NOT CONSTITUTE IMPROPER OPINION TESTIMONY ON THE VERACITY OF THE VICTIM.

If properly preserved for appeal, a trial court's decision regarding the admissibility of testimonial evidence, including opinion testimony, will only be reversed for a manifest abuse of discretion. ***State v. Aguirre***, 168 Wn.2d 350, 359-61, 229 P.3d 669 (2010); ***State v. Young***, 158 Wn. App. 707, 243 P.3d, 172, 179 (2010); ***State v. George***, 150 Wn. App. 110, 117, 206 P.3d 697 (2009). The trial court abuses its discretion "if no reasonable person would have decided the matter as the trial court did." ***State v. Thomas***, 150 Wn.2d 821, 856, 83 P.3d 970 (2004), *review granted in part*, 163 Wn.2d 1033, 187 P.3d 269 (2008). "Where reasonable persons could take differing views regarding the propriety of the trial court's actions, the trial court has not abused its discretion." ***State v. Demery***, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). "That is, such judgments merit reversal only if the trial court acts on unreasonable or untenable grounds." ***Aguirre***, 168 Wn.2d at 359. However, such a decision may be affirmed on any ground the record adequately supports, even if the trial court did not consider that ground. ***State v. Costich***, 152

Wn.2d 463, 477, 98 P.3d 795 (2004). The burden is on the appellant to "establish that the trial court abused its discretion." ***Demery***, 144 Wn.2d at 758.

"Cases involving alleged child sex abuse make the child's credibility 'an inevitable, central issue," and "[w]here the child's credibility is thus put in issue, a court has broad discretion to admit evidence corroborating the child's testimony." ***Kirkman***, 159 Wn.2d at 933

"Generally, no witness may offer testimony in the form of an opinion regarding the guilt or veracity of the defendant," or "the veracity of another witness because such testimony invades the province of the jury as the fact finder in a trial." ***Demery***, 144 Wn.2d at 759-65; ***State v. Black***, 109 Wn.2d 336, 348, 745 P.2d 12 (1987).

"As to the victim, even if there is uncontradicted testimony on a victim's credibility, the jury is not bound by it," and [j]uries are presumed to have followed the trial court's instructions, absent evidence proving the contrary." ***State v. Kirkman***, 159 Wn.2d 918, 928, 155 P.3d 125 (2007). Indeed, "[t]he assertion that the province of the jury has been invaded may often be simple rhetoric." *Id.*

A witness expresses "opinion testimony" if the witness gives "[t]estimony based on [his or her] belief or idea rather than on direct knowledge of facts at issue." ***Demery***, 144 Wn.2d at 760. The Washington State Supreme Court has "expressly declined to take an

expansive view of claims that testimony constitutes an opinion of guilt." ***Demery***, 144 Wn.2d at 760 (*quoting* ***City of Seattle v. Heatley***, 70 Wn. App. 573, 579, 854 P.2d 658 (1993)).

"In determining whether such statements are impermissible opinion testimony, the court will consider the circumstances of the case, including the following factors: '(1) 'the type of witness involved', (2) 'the specific nature of the testimony,' (3) 'the nature of the charges,' (4) 'the type of defense,' and (5) 'the other evidence before the trier of fact." ***Kirkman***, 159 Wn. App. at 928 (*quoting* ***Demery***, 144 Wn.2d at 759, 30 P.3d 1278 (*quoting* ***State v. Heatley***, 70 Wn. App. 573, 579, 854 P.2d 658 (1993))).

In the present case, the defendant argues that portions of Thomas's testimony constituted improper opinion testimony, which "vouched for the credibility of the complainant," C.D. Brief of Appellant, p. 11-17. The record, however, demonstrates that at no point did Thomas so much as comment on, much less vouch for, the credibility of C.D. *See* RP 565-91.

Thomas testified that there are forensic interviewing guidelines, and that she always employs the "funnel method" of interviewing children by which

> the forensic interview starts off with very open-ended questions, you know, like a funnel, and as a child gives information, then the question –the one question becomes more direct and more specific based on the information that has been received. And, therefore, the child leads the interview and the interviewer does not lead the interview.

RP 567-68. Thomas testified that the substantive portion of her interviews are preceded by a rapport-building portion, during which she tries to determine "whether or not the child is ***able to understand the difference between a truth and a lie***," and "able to track [her] questions." RP 569-70 (emphasis added).

> ***It's really important that the child understands the difference between truth and lie and what's right or wrong.*** So we do have this – it's a house that I use this – it's a house that I use and I talk to the child about a little boy throwing a rock and he lies to his mom, and you know, what should he have done and all that stuff. And the kids love it, they just love it, young kids, and it's really for kids ten and under. ***And it's just good to understand whether they really understand what's truthful, what's not truthful, and do they understand what's right and do they understand what's wrong.***

RP 570 (emphasis added).

Thus, Thomas's testimony was that she felt that it was important to know if a child being interviewed can distinguish between the truth and a lie, not that the child being interviewed in this case was actually telling the truth. Indeed, stating that it is "important that the child understands the difference between truth and lie," is not the same as testifying that the child is telling the truth, or even that one believes the child is doing so. A child, like any other witness, may know the difference between the truth and a lie, believe that it is better to tell the truth, and still chose to lie.

Therefore, communicating to the jury that a particular child seems to be able to distinguish between the truth and a lie and seems to know that it is preferable to tell the truth, is not the same as communicating to the jury that this child is actually telling the truth. Indeed, Thomas never testified that C.D. was telling the truth or that Thomas believed that she was. *See* RP 565-91.

Therefore, Thomas did not offer testimony in the form of an opinion regarding the veracity of the victim. *See* ***Demery***, 144 Wn.2d at 759-65. Rather, she simply described her interview protocol, and thus, provided the necessary context for the jury to assess for itself the reasonableness of the victim's responses.

In ***Kirkman***, a case consolidated with ***Candia*** for review, our Supreme Court found that such testimony does not directly address credibility, and thus rejected an argument virtually identical to that advanced by Defendant here. ***Kirkman***, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). *Compare* Brief of Appellant, p. 11-17.

In the ***Kirkman*** case, Detective Kerr testified "about the competency protocol that he gave to [the victim], relating to her ability to tell the truth." *Id.* at 930. When asked why he administered such a protocol, he responded, "[b]ecause I'm –I'm interested in –in this person being able to distinguish between truth and lies." *Id.* Kerr went on to testify that the victim "was able to distinguish between the truth and a lie

and that [the victim] expressly promised to tell him the truth" before relating what the victim said in her interview. *Id.*

In the consolidated ***Candia*** case, Detective Greer "described a 'competency' protocol she administered before interviewing [the victim]," testifying that she "tested [the victim]'s ability to distinguish a truth and a lie and asked the child to promise to tell the truth." *Id.* at 933. "Detective Greer then related what [the victim] told her about her sexual encounters with Candia." *Id.* at 933-34.

The issue before the ***Kirkman*** Court was thus almost the same as the argument presented by defendant here: that because the interviewer "told the jury that he 'tested [the victim's] competency and her truthfulness'... he '[i]n essence' told the jury that [the victim] told him the truth in providing her account of events." *Id.* at 930-31. *Compare* Brief of Appellant, p. 11-17.

The Supreme Court in ***Kirkman*** rejected this proposition, finding that "[t]he challenged portion of [the interviewer's] testimony is simply an account of the interview protocol he used to obtain [the victim]'s statement," and that "[b]y testifying as to this interview protocol, [the interviewer] 'merely provided the necessary context that enabled the jury to assess the reasonableness of the... responses." ***Kirkman***, 159 Wn.2d at 931 (*quoting* ***Demery***, 144 Wn.2d at 764). The Court noted that "[d]etectives often use a similar protocol in all child witness interviews, whether they believe the child witness or not." *Id.* The Court therefore

held that testimony describing "[t]his interview protocol, including that the child promised to tell the truth, does not impermissibly infringe on the jury's province given that the same child takes the witness stand in front of the jury and swears under oath that the testimony given will be truthful." *Id.* at 934.

Like in ***Kirkman***, the child victim here took the stand in front of the jury and swore under oath that the testimony given would be truthful. RP 326. Therefore, under ***Kirkman***, Thomas's testimony describing her interview protocol, including that the child could distinguish truth from lie, and felt it was better to tell the truth, does not impermissibly infringe on the jury's province. ***Kirkman***, 159 Wn.2d at 934. Such testimony was thus properly admitted, and the defendant's motion to exclude it properly denied.

Although the defendant argues that "the evidence relating to the forensic interview here may constitute impermissible opinion testimony and vouching," Brief of Appellant, p. 14, he fails to demonstrate that it actually does. While he claims that Thomas "essentially testified that her truth/lie discussion aids her to ferret out when children are being truthful and when they are not," Brief of Appellant, p. 15-16, Thomas never actually said this. *See* RP 565-91. Rather, during her discussion of her interview protocol, Thomas testified as follows:

> Yes, I've actually had children tell me that it's better to tell a lie than to tell the truth, and we'll find out during the interview process that a parent or some guardian has told them to lie about something.

RP 570-71. Here, Thomas did not testify that her interview protocol allowed her to determine "when children are being truthful and when they are not." Brief of Appellant, p. 15-16. She simply testified that there are children who have told her that they believe it is better to lie. This is not the same as testifying that she is able to discern when a child is lying. Indeed, a child may believe it is better to lie and still chose to tell the truth. Hence, Thomas neither explicitly stated nor in anyway implied that her interview protocol allows her to "ferret out when children are being truthful." Brief of Appellant, p. 15-16.

She simply testified as to the nature of that protocol, and in so doing, "'provided the necessary context that enabled the jury to assess the reasonableness of [C.D.'s] responses" for itself ***Kirkman***, 159 Wn.2d at 931. Hence, Thomas did not offer testimony in the form of an opinion regarding the veracity of the victim, and her testimony was properly admitted.

Therefore, the trial court did not err in denying the defendant's motion to exclude such testimony, and should be affirmed.

2. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO ADMIT EVIDENCE OF THE VICTIM'S MOTHER'S DRUG AND VOCATIONAL HISTORY AS NOT RELEVANT.

If properly preserved for appeal, a trial court's decision regarding the admissibility of testimonial evidence will only be reversed for a manifest abuse of discretion. ***State v. Aguirre***, 168 Wn.2d 350, 359-61, 229 P.3d 669 (2010); ***State v. Young***, 158 Wn. App. 707, 243 P.3d. 172, 179 (2010); ***State v. George***, 150 Wn. App. 110, 117, 206 P.3d 697 (2009). Similarly, the scope of cross examination is a decision within the trial court's discretion. ***State v. Russell***, 125 Wn.2d 24, 92, 882 P.2d 747 (1994).

The trial court abuses its discretion "if no reasonable person would have decided the matter as the trial court did." ***State v. Thomas***, 150 Wn.2d 821, 856, 83 P.3d 970 (2004), *review granted in part*, 163 Wn.2d 1033, 187 P.3d 269 (2008). "That is, such judgments merit reversal only if the trial court acts on unreasonable or untenable grounds." ***Aguirre***, 168 Wn.2d at 359. A decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal

standard. ***In re Marriage of Littlefield***, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997). "A decision is based on untenable grounds if the factual findings are unsupported by the record." *Id.*

However, a trial court's decision regarding the admissibility of testimonial evidence may be affirmed on any ground the record adequately supports even if the trial court did not consider that ground. ***State v. Costich***, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

"Both the Sixth Amendment of the Federal Constitution and art. I, § 22 (amend. 10), of the Washington constitution guarantee an accused the right to compulsory process and the attendance of witnesses." ***State v. Maupin***, 128 Wn.2d 918, 924, 913 P.2d 808 (1996); ***Washington v. Texas***, 388 U.S. 14, 87 S. Ct. 1920, 18 L.Ed.2d 1019 (1967). However, "[t]he right to present defense witnesses is not absolute as 'a criminal defendant has no constitutional right to have irrelevant evidence admitted in his or her defense." ***Maupin***, 128 Wn.2d at 924-25.

Relevant evidence, however, is generally admissible. ER 402. "The threshold to admit relevant evidence is very low," and "[e]ven minimally relevant evidence is admissible." ***State v. Darden***, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002).

ER 401 provides that

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

"To be relevant, evidence must meet two requirements: (1) the evidence must have a tendency to prove or disprove a fact (probative value), and (2) that fact must be of consequence in the context of the other facts and the applicable substantive law (materiality)." ***State v. Rice***, 48 Wn. App. 7, 12, 737 P.2d 726 (1987). "Relevant evidence encompasses facts that present both direct and circumstantial evidence of any element of a claim or defense." ***Rice***, 48 Wn. App. at 12. "Facts tending to establish a party's theory of the case will generally be found to be relevant." *Id.* (*citing* ***State v. Mak***, 105 Wn. 2d 692, 703, 718 P.2d 407 (1986)).

"'It is well settled in Washington that evidence of drug use is admissible to impeach the credibility of a witness ***if there is a showing that the witness was using or was influenced by the drugs at the time of the occurrence which is the subject of the testimony.***'" ***State v. Thomas***, 150 Wn.2d 821, 863-64, 83 P.3d 970 (2004)(*quoting* ***State v. Russell***, 125 Wn.2d 24, 83, 882 P.2d 747 (1994)) (emphasis added). *See* ***State v. Clark***, 48 Wn. App. 850, 863, 743 P.2d 822 (1987). The reason is that the effect of drugs used at the time of an incident may substantially impeach a witness's recall of that incident. *See* ***State v. Kendrick***, 47 Wn. App. 620, 634, 736 P.2d 1079 (1987). Thus, "[f]or evidence of drug use to be admissible to impeach, there must be a reasonable inference that the witness was under the influence of drugs either at the time of the events in

question, or at the time of testifying at trial." ***State v. Tigano***, 63 Wn. App. 336, 344-45, 818 P.2d 1369 (1991). *See* ***State v. Perez***, 139 Wn. App. 522, 529-30, 161 P.3d 461 (2007).

"Evidence of drug use on other occasions, or of drug addiction, is generally inadmissible on the ground that it is impermissibly prejudicial." ***Tigano***, 63 Wn. App. at 344-45.

In the present case, the defendant sought to admit evidence of McCutcheon's alleged "drug use in the time period leading up to the disclosure" of the sexual contact charged in this case. RP 254. The defendant argued that the fact that McCutcheon used drugs, including heroin, until February, 2008, "bears on the lifestyle that she exposed her daughter to," RP 254, and therefore, might explain where C.D. "got some precocious knowledge." RP 284. *See* RP 254-58, 261-62, 283-87.

The defendant also sought to admit evidence that McCutcheon "was employed as an exotic dancer" apparently because it also demonstrated the "lifestyle" to which she exposed C.D., RP 256, and might explain C.D.'s precocious knowledge. RP 284. *See* RP 254-58, 261-62, 283-87.

Finally, the defendant sought to admit evidence of McCutcheon's "current use of drugs, her current involvement in treatment, her current use of methadone" and of CPS "involvement" with McCutcheon from June, 2009 to September, 2010, because he argued that such evidence "corroborates the lifestyle that she was leading back when this occurred."

RP 257. *See* RP 254-58, 261-62, 283-87. The defendant indicated that evidence of the CPS investigation was also relevant to show McCutcheon's "motivation to diminish any relationship with the person who's now being accused of molesting her daughter." RP 285-86.

The court held that found evidence was not relevant and therefore, not admissible. RP 287-303, 305-09, 313-25.

With respect to evidence of McCutcheon's drug use or drug addiction and employment as a stripper, the court held as follows:

> The only reason that I would allow lifestyle evidence to come in – and by lifestyle evidence, I mean stripping employment, heroin addiction, methadone use, drug treatment. ***I think it's only relevant if it affected her [i.e., McCutcheon's] memory; or if there is evidence that the child was exposed to sex offenders, pornography, inappropriate television shows***; but without that evidence, it seems to me that it is simply an attack on the mother to get at the statements of the child and it's too attenuated. And it asks the jury to speculate, because mother's lifestyle was such, therefore child must have been exposed at some point in time to something that would make her say these words.
>
> ***Without evidence of that, I don't think it's appropriate and I'm going to exclude lifestyle evidence from coming into evidence***, allowing the defense to suggest it.

RP 288-89 (emphasis added).

With respect to evidence of CPS "involvement" with McCutcheon from June, 2009 to September, 2010, the court found that "getting into the CPS investigation is simply a backdoor way of talking about her [i.e., McCutcheon's] lifestyle and I'm not going to allow that." RP 296. The

court held that such evidence was not relevant and more prejudicial than probative. RP 301.

The court's decisions to exclude the proposed evidence were proper and not a manifest abuse of discretion.

First, with respect to McCutcheon's drug use, there was no showing, as required by the case law, that McCutcheon "was using or was influenced by the drugs at the time of the occurrence which is the subject of the testimony." ***Thomas***, 150 Wn.2d at 863-64.

In fact, the defendant explicitly stated that he was seeking to admit evidence of drug use before and after the alleged incident, stating that he sought to admit evidence of McCutcheon's alleged "drug use in the time period leading up to the disclosure," RP 254, and to admit evidence of McCutcheon's "current use of drugs, her current involvement in treatment, her current use of methadone." RP 257. Although it is obviously possible that some of this drug use occurred at the time of the charged molestation, the defendant never made any showing that McCutcheon was using or influenced by drugs at the time of that molestation.

Indeed, because McCutcheon was not present when the child molestation at issue occurred, *see* RP 347-49, 353, and was not a witness to that molestation, her drug use could not have affected her perception or

recollection of that molestation, and could not, consistent with the case law, be relevant. *See* ***Kendrick***, 47 Wn. App. at 634.

Because evidence of drug use is admissible to impeach the credibility of a witness only "if there is a showing that the witness was using or was influenced by the drugs at the time of the occurrence which is the subject of the testimony,'" ***Thomas***, 150 Wn.2d at 863-64, and the defendant here failed to make such a showing, this evidence was not admissible, and the trial court properly denied Defendant's motion to admit such evidence as not relevant.

Second, there was no showing that evidence that McCutcheon was employed as an "exotic dancer" or evidence of CPS "involvement" with McCutcheon from June, 2009 to September, 2010, was relevant, and thus, it too, was properly excluded.

Neither piece of evidence had any tendency to prove or disprove a fact that was of consequence in the context of the other facts and the applicable substantive law. There was no showing, beyond conjecture and speculation, *see* RP 256, that work as an exotic dancer could have affected the credibility of McCutcheon, C.D., or any other witness. Nor was there any showing that evidence of CPS involvement, which occurred after the November, 2007 to February, 2008, time period during which the molestation occurred, had any tendency to prove or disprove a fact that

was of consequence in the context of the other facts and the applicable substantive law.

Because, "[t]o be relevant, evidence must" both (1) "have a tendency to prove or disprove a fact" (2) that is "of consequence in the context of the other facts and the applicable substantive law (materiality)," ***Rice***, 48 Wn. App. 7, 12, 737 P.2d 726 (1987), and the proposed evidence met neither of these requirements, the court properly found that such evidence was not relevant. Therefore, the court properly denied the defendant's motion to admit evidence that McCutcheon was employed as an "exotic dancer", and evidence of CPS involvement and should be affirmed.

Although the defendant faults the trial court for comparing her analysis of the admissibility of the disputed evidence to the rape shield statute, Brief of Appellant, p. 24-25, the defendant seems to mistake the court's analogy for its substantive analysis. The trial court spent no more than two sentences on this rape-shield analogy before giving a detailed ruling based solely on relevance. RP 288-89. Because its ruling was not based on the rape-shield statute, its analogy is not relevant. Moreover, even had the trial court's decision regarding the admissibility of the disputed evidence been based on the rape-shield statute, it can be affirmed on any ground the record adequately supports even if the trial court did not consider that ground. ***Costich***, 152 Wn.2d at 477. Therefore, the court's

mention of the rape-shield statute is simply not relevant to appellate review of its decision.

Although the defendant argues that the disputed evidence "bore directly upon the credibility to C.D.'s allegations and McCutcheon's bias," Brief of Appellant, p. 27, the record demonstrates otherwise. Indeed, evidence of McCutcheon's drug use or addiction, her employment, and the CPS investigation, has nothing to do with C.D.'s credibility, and the defendant has failed to show otherwise.

While the defendant argues that the evidence of "McCutcheon's drug addiction, the finding that she was negligent in parenting C.D., and her 15-month involvement with CPS" gave McCutcheon an incentive to "offer testimony favorable to the State's case," Brief of Appellant, p. 25-26, he does not explain why this is true. In fact, the opposite conclusion seems warranted. Assuming that CPS had found McCutcheon negligent in parenting C.D., it would seem that McCutcheon would have an incentive to provide testimony favorable to the defendant. Indeed, if the defendant had been acquitted, then McCutcheon could demonstrate to CPS that C.D. had not been exposed to child molestation while in her care. This would undercut any finding of negligence on her part and vindicate McCutcheon. Although the defendant cites the fact that McCutcheon told C.D. that she was going to "take Dennis to jail" as evidence of McCutcheon's bias,

Brief of Appellant, p. 25-26, RP 343, McCutcheon also explained why that statement was not made out of bias. She testified that her little girl was "very afraid and nervous" and that McCutcheon "wanted to reassure her as her mother that she was safe and... that he [i.e., the defendant] can't hurt her anymore or come close to her." RP 391-92. *See* RP 797.

Because evidence of drug use is admissible to impeach the credibility of a witness only "if there is a showing that the witness was using or was influenced by the drugs at the time of the occurrence which is the subject of the testimony,'" ***Thomas***, 150 Wn.2d at 863-64, and the defendant here failed to make such a showing, this evidence was not admissible. Moreover, because evidence must (1) have a tendency to prove or disprove a fact (2) that is "of consequence in the context of the other facts and the applicable substantive law, ***Rice***, 48 Wn. App. at 12, and the proposed evidence met neither of these requirements with respect to evidence that McCutcheon was employed as an exotic dancer and the subject of a CPS investigation, the court properly found that such evidence was not relevant. Therefore, the trial court properly denied Defendant's motion to admit evidence of the victim's mother's drug and vocational history as not relevant, and should be affirmed.

3. THE DEFENDANT HAS FAILED TO MEET HIS BURDEN OF SHOWING EITHER PROSECUTORIAL MISCONDUCT OR THAT THE UNCHALLENGED ARGUMENT AT ISSUE WAS FLAGRANT AND ILL-INTENTIONED.

Absent a proper objection, a defendant cannot raise the issue of prosecutorial misconduct on appeal unless the misconduct was "'so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice' incurable by a jury instruction." ***State v. Larios-Lopez***, 156 Wn. App. 257, 260, 233 P.3d 899 (2010) (citing ***State v. Gregory***, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006) (quoting ***State v. Stenson***, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008, 118 S. Ct. 1193, 140 L.Ed.2d 323 (1998))). This is because the absence of an objection "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." ***State v. Swan***, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) (*emphasis in original*).

Even where there was a proper objection, an appellant claiming prosecutorial misconduct "bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect." ***State v. Anderson***, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009); ***State v. Fisher***, 165 Wn.2d 727, 746-47, 202 P.3d 937 (2009); ***State v. McKenzie***, 157 Wn.2d 44, 134 P.3d 221 (2006) (*quoting* ***State v. Brown***, 132 Wn.2d

529, 561, 940 P.2d 546 (1997)); ***Beck v. Washington***, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962) (finding that before an appellate court should review a claim based on prosecutorial misconduct, it should require "that [the] burden of showing essential unfairness be sustained by him who claims such injustice."). Hence, a reviewing court must first evaluate whether the prosecutor's comments were improper. ***Anderson***, 153 Wn. App. at 427.

"The State is generally afforded wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence." ***State v. Anderson***, 153 Wn. App. 417, 427-28, 220 P.3d 1273 (2009). "It is not misconduct... for a prosecutor to argue that the evidence does not support the defense theory," and "the prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel." ***State v. Russell***, 125 Wn.2d 24, 87, 882 P.2d 747 (1994).

"A prosecutor's improper comments are prejudicial 'only where 'there is a substantial likelihood the misconduct affected the jury's verdict.'" ***State v. Yates***, 161 Wn.2d 714, 774, 168 P.3d 359 (2007) (*quoting* ***Brown***, 132 Wn.2d at 561, 940 P.2d 546); ***Fisher***, 165 Wn.2d at 747. "A reviewing court does not assess '[t]he prejudicial effect of a prosecutor's improper comments... by looking at the comments in isolation but by placing the remarks 'in the context of the total argument,

the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.'" *Id.* (*quoting* ***Brown***, 132 Wn.2d at 561). "[R]emarks must be read in context." ***State v. Pastrana***, 94 Wn. App. 463, 479, 972 P.2d 557 (1999).

In the present case, the defendant argues that the deputy prosecutor committed prosecutorial misconduct when she stated in closing argument, in regard to C.D. the following:

> Fully toilet trained and begins wetting the bed. C.J. Ellsworth was here and said yes, it can be relevant in treating someone's mental health, can be part of anxiety, it's simply something noteworthy, less so obviously to the medical professionals.

RP 797; Brief of Appellant, p. 21-22, 27-30. The defendant seems to contend that this argument was prosecutorial misconduct because it constituted a "concerted effort to persuade the jury that C.D.'s bedwetting was caused by the alleged inappropriate touch by McDaniel" when there was a "highly plausible alternative explanation for this behavior that the prosecutor successfully was able to exclude from the trial," i.e., evidence of McCutcheon's drug addiction, employment as an exotic dancer, and CPS involvement. Brief of Appellant, p. 29-30.

The defendant, however, never objected to this argument at trial. RP 797. *See* RP 797-824. Therefore, he cannot raise this issue on appeal unless the misconduct, if any, was "'so flagrant and ill-intentioned that it

evinces an enduring and resulting prejudice' incurable by a jury instruction." ***State v. Larios-Lopez***, 156 Wn. App. at 260.

The defendant, however, cannot show that the argument was improper, much less flagrant and ill-intentioned. Indeed, the prosecutor, here was simply summarizing the evidence in the record, and, at most, drawing a reasonable inference from that evidence.

The contested argument is composed of two sentences.

In the first, the deputy prosecutor said, "[f]ully toilet trained and begins wetting the bed." RP 797. This was simply a summary of Ellsworth's testimony that C.D. had "began wetting herself," RP 530, and having "bedwetting problems," RP 539, "after already completing potty training." RP 530.

The prosecutor's next sentence was that "Ellsworth was here and said yes, it can be relevant in treating someone's mental health, can be part of anxiety, it's simply something noteworthy, less so obviously to the medical professionals." RP 797. This first part of this sentence was simply a summary of the testimony. Ellsworth did testify in this trial, RP 522-43, and did testify that the fact that a child who had previously been fully "potty trained" regresses into bedwetting "can" but "not always" be an indicator that abuse has occurred. RP 541. Dr. Rebecca Wiester testified that "bedwetting is a very nonspecific symptom of anxiety, change," though "it's not something that we generally think of as an

indicator for child sexual abuse." RP 647-48. Given the testimony of Ellsworth and Wiseter, it seems reasonable to infer, as the deputy prosecutor did in the latter portion of the second sentence, that bedwetting in a previously "potty-trained" child "can be relevant in treating someone's mental health, can be part of anxiety, it's simply something noteworthy, less so obviously to the medical professionals." RP 797.

Thus, the contested argument was no more than an accurate summary of evidence in the record coupled with a reasonable inference drawn from that evidence. Because "[t]he State is generally afforded wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence," ***State v. Anderson***, 153 Wn. App. 417, 427-28, 220 P.3d 1273 (2009), this argument cannot be considered improper.

Therefore, the defendant has failed to show prosecutorial misconduct and his conviction should be affirmed.

4. THE TRIAL COURT PROPERLY GRANTED THE TRIAL CONTINUANCES BECAUSE THOSE CONTINUANCES DID NOT VIOLATE DEFENDANT'S RIGHTS TO SPEEDY TRIAL AS PROTECTED BY THE TIME FOR TRIAL PROVISIONS OF CRR 3.3.

Under the time for trial provisions of Criminal Rule (CrR) 3.3,

> A defendant who is detained in jail shall be brought to trial within the longer of
>
> (i) 60 days after the commencement date specified in this rule, or

(ii) the time specified under subsection (b)(5).

CrR 3.3(b)(1).

Although CrR 3.3 "protect[s] a defendant's constitutional right to a speedy trial," ***State v. Kenyon***, 167 Wn.2d 130, 136, 216 P.3d 1024 (2009), "the constitutional right to a speedy trial does not mandate trial within 60 days." ***State v. Torres***, 111 Wn. App. 323, 330, 44 P.3d 903 (2002). ***State v. Silva***, 72 Wn. App. 80, 863 P.2d 597 (1993).

Indeed, "[u]nder CrR 3.3(e) certain periods are excluded when computing the time for a speedy trial." ***Kenyon***, 167 Wn.2d at 136. "Continuances" or "[d]elay granted by the court pursuant to section (f)," are among the excluded periods. CrR 3.3(e)(3).

CrR 3.3(f) provides that

> Continuances or other delays may be granted as follows:
>
> (1) Written Agreement. Upon written agreement of the parties, which must be signed by the defendant or all the defendants, the court may continue the trial date to a specified date.
>
> (2) Motion by the Court or a Party. On motion of the court or a party, the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense. The motion must be made before the time for trial has expired. The court must state on the record or in writing the reasons for the continuance. ***The bringing of such a motion by or on behalf of any party waives that party's objection to the requested delay.***

(emphasis added).

"[T]he decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court," ***State v. Saunders***, 153 Wn. App. 209, 216, 220 P.3d 1238 (2009); ***State v. Downing***, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004); ***State v. Cannon***, 130 Wn.2d 313, 326, 922 P.2d 1293 (1996). An abuse of discretion occurs only where the court exercised discretion on untenable grounds or for untenable reasons, ***State v. Silva***, 72 Wn. App. 80, 863 P.2d 597 (1993), and thus, an appellate court "will not disturb the trial court's decision ***unless the appellant or petitioner makes 'a clear showing... [that the trial court's] discretion [is] manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.***'" ***State v. Flinn***, 154 Wn.2d 193, 199, 110 P.3d 748 (2005)(*citing* ***Downing***, 151 Wn.2d at 272 (*quoting* ***State ex rel. Carrol v. Junker***, 79 Wn.2d 12, 26, 482 P.2d 775 (1971))) (emphasis added).

"Common law has clarified that '[i]n exercising its discretion to grant or deny a continuance, the trial court is to consider all relevant factors." ***Flinn***, 154 Wn.2d at 199.

A trial court does not abuse its discretion by granting a continuance "to allow defense counsel more time to prepare for trial, even over the defendant's objection, to ensure effective representation and a fair trial." ***State v. Williams***, 104 Wn. App. 516, 523, 17 P.3d 648

(2001)(*citing* ***State v. Campbell***, 103 Wn.2d 1, 15, 691 P.2d 929 (1984)); ***Flinn***, 154 Wn.2d at 200.

Similarly, "the unavailability of a key witness is a valid reason for a continuance." ***Iniguez***, 167 Wn.2d at 294. A continuance because a material witness is unavailable due to a medical condition is reasonable. ***State v. Lillard***, 122 Wn. App. 422, 93 P.3d 969 (2004). A continuance to accommodate the arresting officer's mandatory training is not unreasonable, where there is a valid reason for the unavailability, the witness will become available within a reasonable time, and the defendant is not substantially prejudiced. ***State v. Jones***, 117 Wn. App. 721, 729, 72 P.3d 1110 (2003). Moreover, a continuance granted due to a prosecutor's unavailability is not an abuse of discretion, ***Williams***, 104 Wn. App. at 523 (*citing* ***Cannon***, 130 Wn.2d at 326), and "scheduling conflicts may be considered in granting continuances." ***Flinn***, 154 Wn.2d at 200 (*citing* ***State v. Heredia-Juarez***, 119 Wn. App. 150, 153-55, 79 P.3d 987 (2003)(valid continuance granted to accommodate prosecutor's reasonably scheduled vacation)).

Finally, the Supreme Court has held that a trial court may continue a trial beyond the time-for-trial deadline for "court congestion," but that when doing so, "the trial court must document the available courtrooms

and judges." ***Kenyon***, 167 Wn.2d at 135-39. *See* ***Flinn***, 154 Wn.2d at 200; ***State v. Silva***, 72 Wn. App. 80, 84-85, 863 P.2d 597 (1993); ***State v. Mack***, 89 Wn.2d 788, 793, 576 P.2d 44 (1978).

"When scheduling a hearing after finding good cause for a continuance, the trial judge can consider known competing conflicts on the calendar." ***Flinn***, 154 Wn.2d at 201. Thus, once the court finds a valid basis justifying the continuance, it has discretion as to how long a period to grant for the continuance. *See Id.*

Moreover, Subsection (b)(5) provides that "[i]f any period of time is excluded pursuant to section (e), the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period. CrR 3.3(b)(5). Thus, once a court has granted a continuance under CrR 3.3(e)(3) & (f), the allowable time for trial does not expire until 30 days after the new trial date.

In the present case, the defendant argues that "[t]he court granted eight continuances" before he was tried, all over his objection, and that all violated the provisions of CrR 3.3. Brief of Appellant, p. 30-36. The record demonstrates otherwise.

Preliminarily, three points should be made. First, although the defendant indicates that there were eight continuances, Brief of Appellant, p. 30, the record reveals that there were only seven: the first on January

15, 2010, the second on June 10, 2010, the third on July 19, 2010, the fourth on September 3, 2010, the fifth on November 2, 2010, the sixth on December 2, 2010, and the seventh on January 6, 2011. CP 159-66; Appendix A-H.

Second, while the defendant indicates that all of these continuances were violations of his "right to a speedy trial," Brief of Appellant, p. 30, 35, his argument seems to rely on the time for trial provisions of CrR 3.3 rather than constitutional speedy trial analysis. *Compare* Brief of Appellant, p. 30-36 *with, e.g.*, ***State v. Iniguez***, 167 Wn.2d 273, 217 P.3d 768 (2009)(examin[ing] the contours of the constitutional right to a speedy trial.")). Therefore, the State's response here is also in terms of CrR 3.3. Should the Court desire additional briefing on constitutional speedy trial, the State would welcome the opportunity to provide it.

Third, although the defendant states that he does "not conced[e] the propriety of any continuances in this case," neither does he make any showing that the court abused its discretion in granting the continuances on June 10, 2010, November 2, 2010, and December 2, 2010. *See* Brief of Appellant, p. 30-36. Because an appellate court "will not disturb the trial court's decision [to grant a continuance] ***unless the appellant or petitioner makes 'a clear showing... [that the trial court's] discretion [is] manifestly unreasonable, or exercised on untenable grounds, or for***

untenable reasons,'" ***State v. Flinn***, 154 Wn.2d at 199 (emphasis added), the trial court's decisions to grant the continuances on June 10, 2010, November 2, 2010, and December 2, 2010 should, therefore, be affirmed.

With respect to the continuances granted on January 15, 2010 and September 3, 2010[2], the defendant states that "no hearings were transcribed on February 24, 2010, or September 9, 2010," and argues that "[t]o the extent the court failed to make an adequate record of the reasons to continue the case over [his] objection, [he] is entitled to reversal of his conviction and dismissal with prejudice." Brief of Appellant, p. 35.

The defendant's argument, however, seems to be based on a confusion of dates, rather than a failure of reporting. While he is correct that "no hearings were transcribed on February 24, 2010, or September 9, 2010," Brief of Appellant, p. 35, this is because no hearings were held on those dates, not because such hearings were not reported or properly conducted. 02/24/10 RP 3; 09/09/10 RP 12.

February 24, 2010 was the original trial date set at defendant's December 30, 2009 arraignment. *See* CP 159; Appendix A. However, this trial was continued to June 10, 2010 with an omnibus hearing set for

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2 The defendant seems to refer to the January 15, 2010 continuance as a February 24, 2010 continuance, and to the September 3, 2010 continuance as a September 9, 2010 continuance. *Compare* Brief of Appellant, p. 30-31, 35, *with* CP 160, 163 *and* Appendix B & E.

March 5, 2010, by a motion to continue held on January 15, 2010. CP 160; Appendix B. Therefore, no hearing was held in this case on February 24, 2010. 02/24/2010 RP 3. A written order was prepared and filed on January 15, 2010, which states that the motion for continuance was brought by the defendant for the reason that "[a]dditional time [was] needed to investigate & prepare." CP 160; Appendix B. The defendant appears to have signed that order. CP 160; Appendix B. Because a trial court does not abuse its discretion by granting a continuance "to allow defense counsel more time to prepare for trial, even over the defendant's objection," ***Williams***, 104 Wn. App. at 523, the trial court did not abuse its discretion in granting the January 15, 2010 continuance of the February 24, 2010 trial date.

September 9, 2010 was a trial date scheduled on July 19, 2010. CP 162; 07/19/10 RP 4-11; Appendix D. However, it was continued to November 2, 2010, by a motion to continue heard on September 3, 2010. CP 163; Appendix E. Therefore, no hearing was held in this case on September 9, 2010. 09/09/10 RP 12. A written order was prepared and filed on September 3, 2010, which indicates that the motion was brought by the State and defense counsel, and that the court continued the trial, over defendant's objection, pursuant to ***State v. Campbell*** because "defense interviews need to be done" and "new discovery was just

obtained via in camera review." CP 163; Appendix E. Again, because a trial court does not abuse its discretion by granting a continuance "to allow defense counsel more time to prepare for trial, even over the defendant's objection," ***Williams***, 104 Wn. App. at 523, the trial court did not abuse its discretion in granting the September 3, 2010, continuance of the September 9, 2010 trial date.

Nor should the court or State be faulted for failure to transcribe the reports of the January 15 or September 3, 2010 proceedings. Under RAP 9.2(b), "[a] party should arrange for the transcription of all those portions of the verbatim report of proceedings necessary to present the issues raised on review." Given that there were written orders continuing trial, dated January 15, 2010 and September 3, 2010, filed with the superior court, CP 160, 163; Appendix B & E, the defendant should have known of these proceedings. Nevertheless, he did not request transcription of them.

With respect to the continuance granted on July 19, 2010, the defendant argues that the prosecutor made no showing that she subpoenaed the unavailable witnesses, and apparently, that the continuance was therefore improperly granted. Brief of Appellant, p. 35-36. The record demonstrates otherwise.

On July 19, 2010, the State moved to continue the trial to September 9, 2010, explaining that "two of the State's material witnesses

are currently unavailable." 07/19/10 RP 4. Those witnesses were S.D., and Elizabeth Wendell. 07/19/10 RP 4. The State indicated that the victim made disclosures regarding the allegations of sexual abuse to both witnesses. 07/19/10 RP 4. The deputy prosecutor explained that S.D. was unavailable July 19 through July 23, 2010 and that Wendell was unavailable, apparently out of the country, until mid to late August, 2010. 07/19/10 RP 4.

While the defendant argues that the prosecutor made no showing that she subpoenaed S.D. and Wendell, the record demonstrates otherwise. The State filed declarations of service of subpoenas to both S.D. and Elizabeth Wendell on June 11, 2010, indicating that both were served, by mail, with subpoenas. CP 168-69; Appendix I. Although the trial date listed on those subpoenas was the June 10, 2010, CP 168-69; Appendix I, "a subpoena ordinarily imposes upon the summoned party a continuing obligation to appear until discharged by the court or the summoning party." ***State v. Tatum***, 74 Wn. App. 81, 86. 871 P.2d 1123 (1994). Because these returns of service were filed with the court prior to the July 19, 2010 motion to continue, CP 167-74, Appendix I, they were part of the record before the court at the time of that motion. Therefore, the State did demonstrate that the unavailable material witnesses had been subpoenaed, and the defendant's argument fails.

At that July 19, 2010 motion, the defendant indicated that he still needed to interview Wendell, that the court was on recess for some time period in August, ending August 23, and that defense counsel was on a "county-mandated furlough" the following week. 07/19/10 RP 4-6. Nevertheless, the defendant objected to the continuance. 07/19/10 RP 7-8.

The trial court found that a continuance of the trial date was "required in the administration of justice pursuant to CrR 3.3(f)(2) and the defendant will not be prejudiced in his or her defense" because of the unavailability of two of the State's witnesses, and defendant's need to interview one of them. CP 162; 07/19/10 RP 9-10; Appendix D.

Because, "the unavailability of a key witness is a valid reason for a continuance." ***Iniguez***, 167 Wn.2d at 294; ***Lillard***, 122 Wn. App. 422, and "scheduling conflicts may be considered in granting continuances." ***Flinn***, 154 Wn.2d at 200, the trial court did not abuse its discretion in granting the July 19, 2010 continuance of the trial to September 9, 2010.

Finally, with respect to the January 6, 2011 continuance, the defendant seems to argue that the court abused its discretion because it "made no record of why another courtroom could not hear the matter, or that other courtrooms were unavailable." Brief of Appellant, p. 36. Although the defendant is correct that the court made no such record, *see*

01/06/11 RP; CP 166, Appendix H, it was not required to do so because it did not continue the trial past the time for trial deadline.

In ***Kenyon***, the Supreme Court held that a trial court may continue a trial beyond the time-for-trial deadline for "court congestion," but that when doing so, "the trial court must document the available courtrooms and judges." ***Kenyon***, 167 Wn.2d at 135-39. However, ***Kenyon*** also stands for the proposition that such a review must be made only when the trial date is continued past the time for trial deadline. In the present case, the court did not continue the trial date past the time for trial deadline.

As demonstrated above, because Defendant failed to show that the court abused its discretion in granting the December 2, 2010 continuance, which continued the trial to January 6, 2011, this Court should affirm the court's decision to grant that continuance. *See* ***Flinn***, 154 Wn.2d at 199. Because, under CrR 3.3(b)(5), the allowable time for trial cannot expire earlier than 30 days after the end of the period during which a trial is properly continued, the time for trial deadline as of the January 6, 2011 trial date was 30 days after January 6, 2011, or February 5, 2011. Hence, when the court granted the January 6, 2011 motion continuing the trial to January 13, 2011, it did not continue the trial date past the time for trial deadline of February 5, 2011. As a result, under ***Kenyon***, 167 Wn.2d at 135-39, the court was not required to document the available courtrooms

and judges at the time of that continuance. Therefore, this continuance was not an abuse of discretion, and the trial court and the defendant's conviction should be affirmed.

However, even assuming that it was err for the court to fail to document the available courtrooms and judges, the proper remedy would not be dismissal. Under CrR 3.3(h), the only basis for dismissal under CrR 3.3 is a failure to bring a case to trial within the time limit established under the rule. Because trial in this case commenced on January 13, 2011, RP 3-5, the case was brought to trial before the February 5, 2011, time limit established by CrR 3.3. Therefore, the failure to conduct a review of courtrooms, even if err, could not serve as a basis for dismissal under CrR 3.3.

Hence, the defendant has failed to make a clear showing that the trial court abused its discretion in granting the continuances in this case. Because an appellate court will not disturb the trial court's decision to grant a continuance unless an appellant makes such a showing, ***Flinn***, 154 Wn.2d at 199, the trial court's decisions to grant the continuances in this case should be affirmed.

D. CONCLUSION.

The trial court properly admitted the testimony of Cornelia Thomas because such testimony did not constitute improper opinion testimony on the veracity of the victims.

The trial court properly denied Defendant's motion to admit evidence of the victim's mother's drug and vocational history as not relevant.

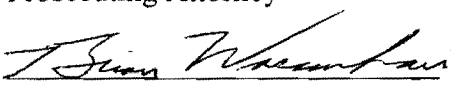
The defendant has failed to meet his burden of showing either prosecutorial misconduct or that the unchallenged argument at issue was flagrant and ill-intentioned.

Finally, the trial court properly granted the trial continuances.

Therefore, the trial court and defendant's conviction should be affirmed.

DATED: March 13, 2012.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



Brian Wasankari
Deputy Prosecuting Attorney
WSB # 28945

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

3.13.12 _____
Date Signature

APPENDIX A

7122 12/31/2009 350135

IN THE SUPERIOR COURT FOR PIERCE COUNTY WASHINGTON

State of Washington,
Plaintiff
vs.
Dennis McDaniel,
Defendant

NO. 09-1-05629-5

SCHEDULING ORDER

IT IS HEREBY ORDERED that:

1. The following court dates are set for the defendant:

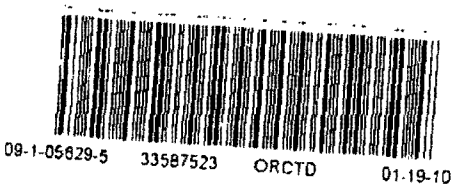
Approval No	Hearing Type	Date	Time	Courtroom
	[ ] Pretrial Conference	,20	AM/PM	
	[ ] Return w/Attorney	,20	AM/PM	
	[X] Omnibus Hearing	1-15 ,2010	11:00 AM/PM	~~CDPJ~~ Dept #1 Judge Orlando Room 411
	[ ] Status Conference	,20	AM/PM	CDPJ
	[ ] Motion (Describe):	,20	AM/PM	CDPJ
	[X] TRIAL	2-24 ,2010	8:30 AM	~~CDPJ~~ Dept #1 Judge Orlando Room 411
	[ ]	,20	AM/PM	

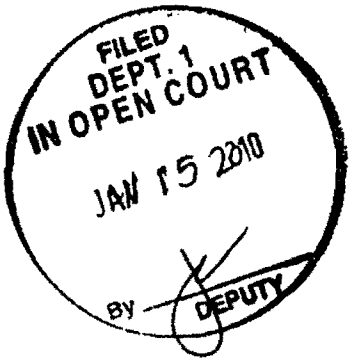
2. Moving papers due: _____ Responsive brief due: _____
3. The defendant shall be present at these hearings and report to the courtroom indicated at
930 Tacoma Avenue South, County-City Building, Tacoma, Washington, 98402
FAILURE TO APPEAR WILL RESULT IN A WARRANT BEING ISSUED FOR YOUR ARREST.
4. [X] DAC; Defendant will be represented by Department of Assigned Counsel.
[ ] Retained Attorney; Defendant will hire their own attorney or, if indigent, be Screened (interviewed) for Department of Assigned Counsel Appointment.

Dated Dec. 30th, 2009.
Copy Received:
Defendant
Attorney for Defendant/Bar # 35166
JUDGE
Prosecuting Attorney/Bar # 16549

I am fluent in the _____ language, and I have translated this entire document for the defendant from English into that language. I certify under penalty of perjury that the forgoing is true and correct.
_____ Pierce County, Washington
Interpreter/Certified/Qualified
Court Reporter

APPENDIX B





SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff
vs.
Dennis McDaniel Defendant

Cause No. 09-1-05629-5

ORDER CONTINUING TRIAL

Case Age 16 Prior Continuances 0

This motion for continuance is brought by ☐ state ☒ defendant ☐ court.
~~☐~~ upon agreement of the parties pursuant to CrR 3.3(f)(1) **or**
☐ is required in the administration of justice pursuant to CrR 3.3(f)(2)and the defendant will not be prejudiced in his or her defense **or**
☐ for administrative necessity
Reasons: Additional time needed to investigate & prepare

☐ RCW 10.46.085 (child victim/sex offense) applies. The Court finds there are substantial and compelling reasons for a continuance and the benefit of postponement outweighs the detriment to the victim.

IT IS HEREBY ORDERED THE DEFENDANT SHALL BE PRESENT AND REPORT TO:

	DATE	TIME	COURT ROOM	ID NUMBER
☒ OMNIBUS HEARING	3-5-10	11:00	411	2136053
☐ STATUS CONFERENCE HEARING				
☐ TRIAL READINESS STATUS CONFERENCE				
THE CURRENT TRIAL DATE OF: 2-24-10	IS CONTINUED TO: 6/10/10 @ 8:30 am Room 411			

Expiration date is: 7-10-10 (Defendant's presence not required) TFT days remaining : 30 days

DONE IN OPEN COURT this 15 day of Jan, 2010.

Defendant

Judge

Attorney for Defendant/Bar # 14496

Prosecuting Attorney/Bar # 36131

I am fluent in the _____ language, and I have translated this entire document for the defendant from English into that language. I certify under penalty of perjury that the foregoing is true and correct.

_____ Pierce County, Washington
Interpreter/Certified/Qualified

_____
Court Reporter

APPENDIX C

09-1-05629-5 34469423 ORCTD 06-11-10

FILED
DEPT. 1
IN OPEN COURT
JUN 10 2010
By DEPUTY

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff
vs.
Dennis McDaniel, Defendant

Cause No. 09-1-05629-5

ORDER CONTINUING TRIAL

Case Age 176 Prior Continuances 1

This motion for continuance is brought by ☐ state ☐ defendant ☐ court.
☑ upon agreement of the parties pursuant to CrR 3.3(f)(1) **or**
☐ is required in the administration of justice pursuant to CrR 3.3(f)(2)and the defendant will not be prejudiced in his or her defense **or**
☐ for administrative necessity.
Reasons: State received new discovery - counseling records interviews need to be set up

☐ RCW 10.46.085 (child victim/sex offense) applies. The Court finds there are substantial and compelling reasons for a continuance and the benefit of postponement outweighs the detriment to the victim.

IT IS HEREBY ORDERED THE DEFENDANT SHALL BE PRESENT AND REPORT TO:

	DATE	TIME	COURT ROOM	ID NUMBER
☐ OMNIBUS HEARING				
☒ STATUS CONFERENCE HEARING				
☐				

THE CURRENT TRIAL DATE OF: 6-10-10 **IS CONTINUED TO:** 7-19-10 **@ 8:30 am Room** Dept 1

Expiration date is: 8-19-10 (Defendant's presence not required) TFT days remaining : 30 days

DONE IN OPEN COURT this 10 day of June 2010

Defendant

Judge

Attorney for Defendant/Bar # 14496

Prosecuting Attorney/Bar # 36137

I am fluent in the _____ language, and I have translated this entire document for the defendant from English into that language. I certify under penalty of perjury that the foregoing is true and correct.

_____ Pierce County, Washington
Interpreter/Certified/Qualified

_____
Court Reporter

APPENDIX D

1599?? 7/28/2010 ??????

09-1-05629-5 34733134 ORCTD 07-28-10

FILED
DEPT. 1
IN OPEN COURT
JUL 19 2010
By [signature] DEPUTY

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff	Cause No. 09-1-05629-5
vs.	ORDER CONTINUING TRIAL
Dennis McDaniel, Defendant	Case Age 211 Prior Continuances 2

This motion for continuance is brought by ☒ state ☐ defendant ☐ court.

☐ upon agreement of the parties pursuant to CrR 3.3(f)(1) or

☒ is required in the administration of justice pursuant to CrR 3.3(f)(2)and the defendant will not be prejudiced in his or her defense or

☐ for administrative necessity.

Reasons: State witness S.M.D. unavailable week of 7/14 - 7/23. State witness Elizabeth Wendel unavailable until mid to late August, & interview with Elizabeth Wendel needs to be set up.

☐ RCW 10.46.085 (child victim/sex offense) applies. The Court finds there are substantial and compelling reasons for a continuance and the benefit of postponement outweighs the detriment to the victim.

IT IS HEREBY ORDERED THE DEFENDANT SHALL BE PRESENT AND REPORT TO:

	DATE	TIME	COURT ROOM	ID NUMBER
☐ OMNIBUS HEARING				
☐ STATUS CONFERENCE HEARING				
☒ Bail hrg	7-23-10	11:00AM	411 Dept 1	
THE CURRENT TRIAL DATE OF: 7-19-10	IS CONTINUED TO: 9-9-10	@ 8:30 am Room 411 / Dept 1		

Expiration date is: ________ (Defendant's presence not required) TFT days remaining : 30 days

DONE IN OPEN COURT this 19th day of July, 2010.

present in courtroom, received notice

Defendant

[signature]

Judge

[signature]

Attorney for Defendant/Bar # 14496

[signature]

Prosecuting Attorney/Bar # 36131

I am fluent in the ____________ language, and I have translated this entire document for the defendant from English into that language. I certify under penalty of perjury that the foregoing is true and correct.

____________ Pierce County, Washington

Interpreter/Certified/Qualified

____

Court Reporter

F:\Word_Excel\Criminal Matters\Criminal Forms\Revised Order Continuing Trial 11-12-04.DOC
Z-2802

APPENDIX E

09-1-05629-5 34965850 ORCTD 09-07-10

FILED
DEPT. 1
IN OPEN COURT
SEP 03 2010
By DEPUTY

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff
vs.
Dennis McDaniel, Defendant

Cause No. 09-1-05629-5

ORDER CONTINUING TRIAL

Case Age 261 Prior Continuances 3

This motion for continuance is brought by ☒ state ☐ defendant ☐ court.
☒ upon agreement of the parties pursuant to CrR 3.3(f)(1) or
☐ is required in the administration of justice pursuant to CrR 3.3(f)(2) and the defendant will not be prejudiced in his or her defense or
☐ for administrative necessity.
Reasons: Continuance requested per State v. Campbell defense interviews need to be done, new discovery just obtained via in camera review.

☐ RCW 10.46.085 (child victim/sex offense) applies. The Court finds there are substantial and compelling reasons for a continuance and the benefit of postponement outweighs the detriment to the victim.

IT IS HEREBY ORDERED THE DEFENDANT SHALL BE PRESENT AND REPORT TO:

	DATE	TIME	COURT ROOM	ID NUMBER
☐ OMNIBUS HEARING				
☒ STATUS CONFERENCE HEARING	10/15/10	11am	CD1	
☐				
THE CURRENT TRIAL DATE OF 9/9/10	IS CONTINUED TO: 11/2/10 @ 8:30 am Room 411			

Expiration date is: 12/2/10 (Defendant's presence not required) TFT days remaining: 30

DONE IN OPEN COURT this 3rd day of Sept, 2010

objects
Defendant

Judge

Attorney for Defendant/Bar # 14496

Prosecuting Attorney/Bar # 32284

I am fluent in the _____ language, and I have translated this entire document for the defendant from English into that language. I certify under penalty of perjury that the foregoing is true and correct

_____ Pierce County, Washington
Interpreter/Certified/Qualified

_____
Court Reporter

F:\Word_Excel\Criminal Matters\Criminal Forms\Revised Order Continuing Trial 11-12-04.DOC
Z-2802

APPENDIX F

09-1-05629-5 35337810 ORCTD 11-05-10

FILED
DEPT. 1
IN OPEN COURT
NOV 02 2010
By DEPUTY

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff
vs.
Dennis McDaniel Defendant

Cause No. 09-1-05629-5

ORDER CONTINUING TRIAL

Case Age _____ Prior Continuances _____

This motion for continuance is brought by ☒ state ☒ defendant ☐ court.
☒ upon agreement of the parties pursuant to CrR 3.3(f)(1) **or**
☐ is required in the administration of justice pursuant to CrR 3.3(f)(2)and the defendant will not be prejudiced in his or her defense **or**
☐ for administrative necessity.
Reasons: assigned judge in trial on another case, interviews recently completed, defense counsel has vacation, State is providing transcripts relevant to 10.58.090 motion.
☐ RCW 10.46.085 (child victim/sex offense) applies. The Court finds there are substantial and compelling reasons for a continuance and the benefit of postponement outweighs the detriment to the victim.

IT IS HEREBY ORDERED THE DEFENDANT SHALL BE PRESENT AND REPORT TO:

	DATE	TIME	COURT ROOM	ID NUMBER
☐ OMNIBUS HEARING				
☒ STATUS CONFERENCE HEARING	11/18/10	10:30 am	411	
☒ Bail Hrg	11/12/10	10:30 am	411	
THE CURRENT TRIAL DATE OF: 11/2/10	IS CONTINUED TO: 12/2/10	@ 8:30 am Room 411		

Expiration date is: 1/2/11 (Defendant's presence not required) TFT days remaining : 30

DONE IN OPEN COURT this 2nd day of Nov, 2010

Refused to sign
Defendant

JAMES ORLANDO
Judge

Attorney for Defendant/Bar # 24496

Michelle Hyer
Prosecuting Attorney/Bar # 32724

I am fluent in the _____ language, and I have translated this entire document for the defendant from English into that language. I certify under penalty of perjury that the foregoing is true and correct.

_____ Pierce County, Washington
Interpreter/Certified/Qualified

_____
Court Reporter

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Z-2802

APPENDIX G

12/3/2010 11:36 648152

09-1-05629-5 35467659 ORCTD 12-02-10

FILED
DEPT. 1
IN OPEN COURT
DEC 02 2010
By DEPUTY

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff
vs.
Dennis McDaniel Defendant

Cause No. 09-1-05629-5

ORDER CONTINUING TRIAL

Case Age 351 Prior Continuances 5

This motion for continuance is brought by ☐ state ☒ defendant ☐ court.

~~☒ upon agreement of the parties pursuant to CrR 3.3(f)(1) or~~

☒ is required in the administration of justice pursuant to CrR 3 3(f)(2)and the defendant will not be prejudiced in his or her defense **or**

☐ for administrative necessity.

Reasons. defense counsel Quigley is currently in trial on State V. Lopez-Ramos. State is ready for trial.

☐ RCW 10.46.085 (child victim/sex offense) applies The Court finds there are substantial and compelling reasons for a continuance and the benefit of postponement outweighs the detriment to the victim

IT IS HEREBY ORDERED THE DEFENDANT SHALL BE PRESENT AND REPORT TO:

	DATE	TIME	COURT ROOM	ID NUMBER
☐ OMNIBUS HEARING				
☐ STATUS CONFERENCE HEARING				
☐				

THE CURRENT TRIAL DATE OF 12/2/10 IS CONTINUED TO: 1/6/11 @ 8:30 am Room 531

Expiration date is: 2/5/11 (Defendant's presence not required) TFT days remaining 30.

DONE IN OPEN COURT this 2nd day of Dec, 2010

Refused to sign
Defendant

Judge

Attorney for Defendant/Bar #

Prosecuting Attorney/Bar # 32789

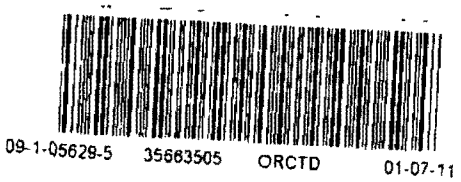
I am fluent in the _____ language, and I have translated this entire document for the defendant from English into that language I certify under penalty of perjury that the foregoing is true and correct.

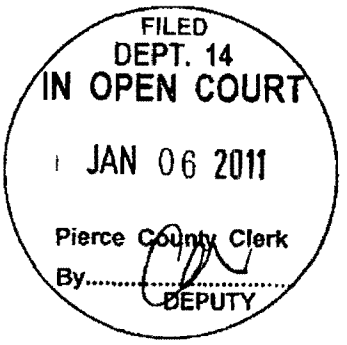
_____ Pierce County, Washington
Interpreter/Certified/Qualified

_____
Court Reporter

F:\Word_Excel\Criminal Matters\Criminal Forms\Revised Order Continuing Trial 11-12-04.DOC
Z-2802

APPENDIX H





SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff
vs.
Dennis McDaniel Defendant

Cause No 09-1-05629-5

ORDER CONTINUING TRIAL

Case Age 386 Prior Continuances 6

This motion for continuance is brought by ☐ state ☐ defendant ☒ court.
☐ upon agreement of the parties pursuant to CrR 3 3(f)(1) **or**
☒ is required in the administration of justice pursuant to CrR 3 3(f)(2)and the defendant will not be prejudiced in his or her defense **or**
☐ for administrative necessity.
Reasons the pre-assigned Court is currently in trial on State v. Randall. This case would likely be heard Monday.
☐ RCW 10.46 085 (child victim/sex offense) applies. The Court finds there are substantial and compelling reasons for a continuance and the benefit of postponement outweighs the detriment to the victim

IT IS HEREBY ORDERED THE DEFENDANT SHALL BE PRESENT AND REPORT TO:

	DATE	TIME	COURT ROOM	ID NUMBER
☐ OMNIBUS HEARING				
☐ STATUS CONFERENCE HEARING				
☐ TRIAL READINESS STATUS CONFERENCE				
THE CURRENT TRIAL DATE OF: 1/6/11	IS CONTINUED TO: 1/13/11	@ 8:30 am	Room 531	

Expiration date is: 2/12/11 (Defendant's presence not required) TFT days remaining : 30

DONE IN OPEN COURT this 6th day of Jan 2011

Refused to sign
Defendant

Judge

Attorney for Defendant/Bar # 14496

Prosecuting Attorney/Bar # 32724

I am fluent in the _____ language, and I have translated this entire document for the defendant from English into that language. I certify under penalty of perjury that the foregoing is true and correct

_____ Pierce County, Washington
Interpreter/Certified/Qualified

_____
Court Reporter

APPENDIX I

8578 6/14/2010 08238

8

09-1-05629-5 34471069 RTSB 06-14-10

FILED
IN COUNTY CLERK'S OFFICE

A.M. JUN 11 2010 P.M.

PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY _____ DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, Plaintiff, vs. DENNIS MCDANIEL Defendant.	Cause Number 09-1-05629-5 SUBPOENA FOR JURY TRIAL Subpoena ID# 682259 INCIDENT #:TACPD / 091730898 INCIDENT DATE : 06/22/2007

Greetings to: MARIA DEL CARMEN GARCIA-DIONISIO

YOU ARE HEREBY COMMANDED to appear in Pierce County Superior Court, County City Building, 930 Tacoma Avenue South, Room 411, Tacoma, Washington on 06/10/10, at 09:00 am , to give evidence on behalf of the Plaintiff, State of Washington.

Your contact person for this subpoena is LORI WILSON, at (253) 798-6718. YOU MUST CALL THIS PERSON UPON RECEIPT OF YOUR SUBPOENA AND PROVIDE A CURRENT PHONE NUMBER AND ADDRESS.

You are not expected to be present during the entire trial. We will advise you of the day and approximate time your testimony will be needed. Due to court congestion and other reasons, it is possible that the trial will not commence on the date stated. If we have a current phone number for you, we will attempt to advise you of any scheduling changes. This subpoena, however, remains in effect and imposes a continuing duty to appear until you are discharged. You may submit a claim form for your attendance and mileage. Should you neglect to complete the form, no fees will be disbursed to you.

DATED: 06/04/2010

Declaration of Service.
The undersigned declares under penalty of perjury:

That I served/mailed/faxed the within subpoena upon Per Byra by handing him/her a copy of the same on this date.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated: 6-10-10
Place: Tacoma, Washington

Allen C Bennett
Signature

S/ JENNIFER R HERNANDEZ
JENNIFER R HERNANDEZ
Deputy Prosecuting Attorney, WSBA NO. 36131

ISU RECEIVED
JUN 08 2010

SUBPOENA FOR JURY TRIAL

Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, WA 98402-2171
Main Office: (253) 798-7400

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, Plaintiff, vs. DENNIS MCDANIEL *Defendant.*	Cause Number 09-1-05629-5 SUBPOENA FOR JURY TRIAL Subpoena ID# 682262 INCIDENT #:TACPD / 091730898 INCIDENT DATE : 06/22/2007

Greetings to: S. M D.

YOU ARE HEREBY COMMANDED to appear in Pierce County Superior Court, County City Building, 930 Tacoma Avenue South, Room 411, Tacoma, Washington on 06/10/10, at 09:00 am , to give evidence on behalf of the Plaintiff, State of Washington.

Your contact person for this subpoena is LORI WILSON, at (253) 798-6718. YOU MUST CALL THIS PERSON UPON RECEIPT OF YOUR SUBPOENA AND PROVIDE A CURRENT PHONE NUMBER AND ADDRESS.

You are not expected to be present during the entire trial. We will advise you of the day and approximate time your testimony will be needed. Due to court congestion and other reasons, it is possible that the trial will not commence on the date stated. If we have a current phone number for you, we will attempt to advise you of any scheduling changes. This subpoena, however, remains in effect and imposes a continuing duty to appear until you are discharged. You may submit a claim form for your attendance and mileage. Should you neglect to complete the form, no fees will be disbursed to you.

DATED: 06/04/2010

Declaration of Service:
The undersigned declares under penalty of perjury:
That I served/mailed/faxed the within subpoena upon Dr DPA by handing *him/her a copy of the same on this date.*
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct
Dated: 6-10-10
Place: Tacoma, Washington

Signature

S/ JENNIFER R HERNANDEZ
JENNIFER R HERNANDEZ
Deputy Prosecuting Attorney, WSBA NO. 36131

ISU RECEIVED
JUN 0 8 2010

SUBPOENA FOR JURY TRIAL

Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, WA 98402-2171
Main Office: (253) 798-7400

8578 6/15/2010 08248

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, Plaintiff, vs. DENNIS MCDANIEL Defendant.	Cause Number 09-1-05629-5 SUBPOENA FOR JURY TRIAL Subpoena ID# 682257 INCIDENT #:TACPD / 091730898 INCIDENT DATE : 06/22/2007

Greetings to: ELIZABETH WENDEL

YOU ARE HEREBY COMMANDED to appear in Pierce County Superior Court, County City Building, 930 Tacoma Avenue South, Room 411, Tacoma, Washington on 06/10/10, at 09:00 am , to give evidence on behalf of the Plaintiff, State of Washington.

Your contact person for this subpoena is LORI WILSON, at (253) 798-6718. YOU MUST CALL THIS PERSON UPON RECEIPT OF YOUR SUBPOENA AND PROVIDE A CURRENT PHONE NUMBER AND ADDRESS.

You are not expected to be present during the entire trial. We will advise you of the day and approximate time your testimony will be needed. Due to court congestion and other reasons, it is possible that the trial will not commence on the date stated. If we have a current phone number for you, we will attempt to advise you of any scheduling changes. This subpoena, however, remains in effect and imposes a continuing duty to appear until you are discharged. You may submit a claim form for your attendance and mileage. Should you neglect to complete the form, no fees will be disbursed to you.

DATED: 06/04/2010

Declaration of Service:
The undersigned declares under penalty of perjury:
That I served/mailed/faxed the within subpoena upon Dennis Dyer by handing him/her a copy of the same on this date.
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
Dated: 6-10-10
Place: Tacoma, Washington

Allen R Burnett
Signature

S/ JENNIFER R HERNANDEZ
JENNIFER R HERNANDEZ
Deputy Prosecuting Attorney, WSBA NO. 36131

ISU RECEIVED
JUN 08 2010

SUBPOENA FOR JURY TRIAL

Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, WA 98402-2171
Main Office: (253) 798-7400

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, Plaintiff, vs. DENNIS MCDANIEL Defendant.	Cause Number 09-1-05629-5 SUBPOENA FOR JURY TRIAL Subpoena ID# 682261 INCIDENT #:TACPD / 091730898 INCIDENT DATE : 06/22/2007

Greetings to: REBECCA WIESTER, MD

YOU ARE HEREBY COMMANDED to appear in Pierce County Superior Court, County City Building, 930 Tacoma Avenue South, Room 411, Tacoma, Washington on 06/10/10, at 09:00 am , to give evidence on behalf of the Plaintiff, State of Washington.

Your contact person for this subpoena is LORI WILSON, at (253) 798-6718. YOU MUST CALL THIS PERSON UPON RECEIPT OF YOUR SUBPOENA AND PROVIDE A CURRENT PHONE NUMBER AND ADDRESS.

You are not expected to be present during the entire trial. We will advise you of the day and approximate time your testimony will be needed. Due to court congestion and other reasons, it is possible that the trial will not commence on the date stated. If we have a current phone number for you, we will attempt to advise you of any scheduling changes. This subpoena, however, remains in effect and imposes a continuing duty to appear until you are discharged. You may submit a claim form for your attendance and mileage. Should you neglect to complete the form, no fees will be disbursed to you.

DATED: 06/04/2010

Declaration of Service:
The undersigned declares under penalty of perjury:
That I served/mailed/faxed the within subpoena upon [illegible] by handing him/her a copy of the same on this date.
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
Dated: 6-10-10
Place: Tacoma, Washington

Allen I Bennett
Signature

S/ JENNIFER R HERNANDEZ
JENNIFER R HERNANDEZ
Deputy Prosecuting Attorney, WSBA NO. 36131

ISU RECEIVED
JUN 08 2010

SUBPOENA FOR JURY TRIAL

Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, WA 98402-2171
Main Office: (253) 798-7400

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, Plaintiff, vs. DENNIS MCDANIEL Defendant.	Cause Number 09-1-05629-5 SUBPOENA FOR JURY TRIAL Subpoena ID# 682254 INCIDENT #:TACPD / 091730898 INCIDENT DATE : 06/22/2007

Greetings to: C.-M. D.

YOU ARE HEREBY COMMANDED to appear in Pierce County Superior Court, County City Building, 930 Tacoma Avenue South, Room 411, Tacoma, Washington on 06/10/10, at 09:00 am , to give evidence on behalf of the Plaintiff, State of Washington.

Your contact person for this subpoena is LORI WILSON, at (253) 798-6718. YOU MUST CALL THIS PERSON UPON RECEIPT OF YOUR SUBPOENA AND PROVIDE A CURRENT PHONE NUMBER AND ADDRESS.

You are not expected to be present during the entire trial. We will advise you of the day and approximate time your testimony will be needed. Due to court congestion and other reasons, it is possible that the trial will not commence on the date stated. If we have a current phone number for you, we will attempt to advise you of any scheduling changes. This subpoena, however, remains in effect and imposes a continuing duty to appear until you are discharged. You may submit a claim form for your attendance and mileage. Should you neglect to complete the form, no fees will be disbursed to you.

DATED: 06/04/2010

Declaration of Service:
The undersigned declares under penalty of perjury:
That I served/mailed/faxed the within subpoena upon Ric Dyatt by handing him/her a copy of the same on this date.
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
Dated: 6-10-10
Place: Tacoma, Washington

Allen E Bennett
Signature

S/ JENNIFER R HERNANDEZ
JENNIFER R HERNANDEZ
Deputy Prosecuting Attorney, WSBA NO. 36131

ISU RECEIVED
JUN 08 2010

SUBPOENA FOR JURY TRIAL

Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, WA 98402-2171
Main Office: (253) 798-7400

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, Plaintiff, vs. DENNIS MCDANIEL Defendant.	Cause Number 09-1-05629-5 SUBPOENA FOR JURY TRIAL Subpoena ID# 682260 INCIDENT #:TACPD / 091730898 INCIDENT DATE : 06/22/2007

Greetings to: RACHEL MCCUTCHEON

YOU ARE HEREBY COMMANDED to appear in Pierce County Superior Court, County City Building, 930 Tacoma Avenue South, Room 411, Tacoma, Washington on 06/10/10, at 09:00 am , to give evidence on behalf of the Plaintiff, State of Washington.

Your contact person for this subpoena is LORI WILSON, at (253) 798-6718. YOU MUST CALL THIS PERSON UPON RECEIPT OF YOUR SUBPOENA AND PROVIDE A CURRENT PHONE NUMBER AND ADDRESS.

You are not expected to be present during the entire trial. We will advise you of the day and approximate time your testimony will be needed. Due to court congestion and other reasons, it is possible that the trial will not commence on the date stated. If we have a current phone number for you, we will attempt to advise you of any scheduling changes. This subpoena, however, remains in effect and imposes a continuing duty to appear until you are discharged. You may submit a claim form for your attendance and mileage. Should you neglect to complete the form, no fees will be disbursed to you.

DATED: 06/04/2010

Declaration of Service:
The undersigned declares under penalty of perjury:

That I served/mailed/faxed the within subpoena upon Ben Byon by handing him/her a copy of the same on this date.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated: 6-10-10
Place: Tacoma, Washington

Allen E Bennett
Signature

S/ JENNIFER R HERNANDEZ
JENNIFER R HERNANDEZ
Deputy Prosecuting Attorney, WSBA NO. 36131

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JUN 0 8 2010

SUBPOENA FOR JURY TRIAL

Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, WA 98402-2171
Main Office: (253) 798-7400

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, Plaintiff, vs. DENNIS MCDANIEL Defendant.	Cause Number 09-1-05629-5 SUBPOENA FOR JURY TRIAL Subpoena ID# 682258 INCIDENT #:TACPD / 091730898 INCIDENT DATE : 06/22/2007

Greetings to: *LATONYA TURNER*

YOU ARE HEREBY COMMANDED to appear in Pierce County Superior Court, County City Building, 930 Tacoma Avenue South, Room 411, Tacoma, Washington on 06/10/10, at 09:00 am , to give evidence on behalf of the Plaintiff, State of Washington.

Your contact person for this subpoena is LORI WILSON, at (253) 798-6718. YOU MUST CALL THIS PERSON UPON RECEIPT OF YOUR SUBPOENA AND PROVIDE A CURRENT PHONE NUMBER AND ADDRESS.

You are not expected to be present during the entire trial. We will advise you of the day and approximate time your testimony will be needed. Due to court congestion and other reasons, it is possible that the trial will not commence on the date stated. If we have a current phone number for you, we will attempt to advise you of any scheduling changes. This subpoena, however, remains in effect and imposes a continuing duty to appear until you are discharged. You may submit a claim form for your attendance and mileage. Should you neglect to complete the form, no fees will be disbursed to you.

DATED: 06/04/2010

Declaration of Service:
The undersigned declares under penalty of perjury:
That I served/mailed/faxed the within subpoena upon _____ by handing him/her a copy of the same on this date.
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
Dated: 6-10-10
Place: Tacoma, Washington

Signature

S/ JENNIFER R HERNANDEZ
JENNIFER R HERNANDEZ
Deputy Prosecuting Attorney, WSBA NO. 36131

ISU RECEIVED
JUN 0 8 2010

SUBPOENA FOR JURY TRIAL

Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, WA 98402-2171
Main Office: (253) 798-7400

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, Plaintiff, vs. DENNIS MCDANIEL Defendant.	Cause Number 09-1-05629-5 SUBPOENA FOR JURY TRIAL Subpoena ID# 682255 INCIDENT #:TACPD / 091730898 INCIDENT DATE : 06/22/2007

Greetings to: CASSANDRA ELLSWORTH

YOU ARE HEREBY COMMANDED to appear in Pierce County Superior Court, County City Building, 930 Tacoma Avenue South, Room 411, Tacoma, Washington on 06/10/10, at 09:00 am , to give evidence on behalf of the Plaintiff, State of Washington.

Your contact person for this subpoena is LORI WILSON, at (253) 798-6718. YOU MUST CALL THIS PERSON UPON RECEIPT OF YOUR SUBPOENA AND PROVIDE A CURRENT PHONE NUMBER AND ADDRESS.

You are not expected to be present during the entire trial. We will advise you of the day and approximate time your testimony will be needed. Due to court congestion and other reasons, it is possible that the trial will not commence on the date stated. If we have a current phone number for you, we will attempt to advise you of any scheduling changes. This subpoena, however, remains in effect and imposes a continuing duty to appear until you are discharged. You may submit a claim form for your attendance and mileage. Should you neglect to complete the form, no fees will be disbursed to you.

DATED: 06/04/2010

Declaration of Service:
The undersigned declares under penalty of perjury:
That I served/mailed/faxed the within subpoena upon Lori Rapa by handing him/her a copy of the same on this date.
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
Dated: 6-10-10
Place: Tacoma, Washington

Signature

S/ JENNIFER R HERNANDEZ
JENNIFER R HERNANDEZ
Deputy Prosecuting Attorney, WSBA NO. 36131

ISU RECEIVED
JUN 08 2010

SUBPOENA FOR JURY TRIAL

Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, WA 98402-2171
Main Office: (253) 798-7400

PIERCE COUNTY PROSECUTOR

March 13, 2012 - 3:27 PM

Transmittal Letter

Document Uploaded: 418851-Respondent's Brief.pdf

Case Name: St. v. Dennis McDaniel

Court of Appeals Case Number: 41885-1

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: _____

Sender Name: Therese M Kahn - Email: **tnichol@co.pierce.wa.us**

A copy of this document has been emailed to the following addresses:

david@washapp.org